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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 FREDDIE FIGUEROA,

No. C 06-02628 SI

9 Plaintiff,

**ORDER RE: PLAINTIFF'S MOTION TO
STRIKE**

10 v.

11 DENNIS ALLEN SMITH, and DOES 1 through
12 10, inclusive,

13 Defendants.
14 _____/

15 Plaintiff has filed a motion to strike defendant's experts, or alternatively for attorneys fees.
16 Having reviewed the papers, pursuant to Civil Local Rule 7-1(b), the Court determines that plaintiff's
17 motion is suitable for resolution without oral argument, and hereby VACATES the May 11, 2007
18 hearing. For the following reasons, and for good cause shown, the Court DENIES plaintiff's motion.

19 This is a personal injury action, in which plaintiff alleges that he was struck by defendant's truck
20 while crossing the street in Martinez, California. Trial is currently scheduled for June 18, 2007.
21 Defendant conducted an independent medical examination (IME) on plaintiff on February 27, 2007.
22 Pursuant to this Court's order, the parties were to exchange expert reports, including the report of Dr.
23 Howard Sturtz, who conducted the IME, by March 6, 2007. Defendant missed this deadline, and did
24 not give plaintiff Dr. Sturtz's report until March 13, 2007. Plaintiff subsequently took Dr. Sturtz's
25 deposition on March 27, 2007. The expert discovery deadline was March 30, 2007.

26 Plaintiff's motion asks the Court to prevent Dr. Sturtz from testifying at trial, because defendant
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1 filed Dr. Sturtz's expert report one week late.¹ Plaintiff also complains that Dr. Sturtz's report was
 2 deficient because it did not indicate whether he has testified in other cases over the past four years, and
 3 whether he has any publications. On March 21, 2007, defendant supplemented the report to include a
 4 list of other cases in which Dr. Sturtz has testified. *See* Oppo., Ex. C.

5 Federal Rule of Civil Procedure 37 provides in part:

6 A party that without substantial justification fails to disclose information required by
 7 Rule 26(a) or 26 (e)(1), or to amend a prior response to discovery as required by Rule
 8 26(e)(2) is not, unless such failure is harmless, permitted to use as evidence at a trial,
 9 or a hearing, or on a motion any witness or information not so disclosed.

10 Fed. R. Civ. P. 37(c)(1). The determination of whether a failure to disclose is justified or harmless is
 11 entrusted to the broad discretion of the district court. *Mid-America Tablewares, Inc. v. Mogi Trading*
 12 *Co.*, 100 F.3d 1353, 1363 (7th Cir. 1996). In the Ninth Circuit, the following factors are used to guide
 13 the court's discretion: "1) the public's interest in expeditious resolution of litigation; 2) the court's need
 14 to manage its docket; 3) the risk of prejudice to the defendants; 4) the public policy favoring disposition
 15 of cases on their merits; 5) the availability of less drastic sanctions." *Wendt v. Host Int'l, Inc.*, 125 F.3d
 16 806, 814 (9th Cir. 1997).

17 The Court finds that defendant's one-week delay in providing Dr. Sturtz's report was relatively
 18 harmless. After receiving Dr. Sturtz's report, plaintiff had two weeks to prepare for his deposition.
 19 Moreover, on March 16, 2007, defendant offered to waive the discovery cut-off with respect to Dr.
 20 Sturtz, to allow plaintiff to take his deposition at a later date. *See* Oppo., Ex. D. Defendant also offered
 21 to pay the costs associated with Dr. Sturtz deposition. *See id.* Plaintiff rejected these offers. Thus, to
 22 the extent that plaintiff suffered any harm from the one-week delay in receiving Dr. Sturtz's report,
 23 plaintiff could have easily mitigated that harm.

24 ¹In addition to Dr. Sturtz, Defendant also initially identified an accident reconstruction expert.
 25 Defendant has now withdrawn this expert. Accordingly, IT IS ORDERED that defendant may not call
 26 any accident reconstruction expert and plaintiff's motion to strike defendant's accident reconstruction
 27 expert is DENIED AS MOOT.

28 Plaintiff also moves to strike the deposition testimony of Andrew Urban and Dr. William
 Birdsong, which defendant took without proper notice to plaintiff. The parties have since stipulated that
 these two depositions will be inadmissible. Accordingly, IT IS ORDERED the deposition testimony
 of Urban and Dr. Birdsong will not be admissible at trial and plaintiff's motion to strike their deposition
 testimony is DENIED AS MOOT.

1 For the foregoing reasons and for good cause shown, the Court hereby DENIES plaintiff's
2 motion to strike or alternatively for attorneys fees. [Docket No. 30]

3 **IT IS SO ORDERED.**

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5 Dated: May 7, 2007



SUSAN ILLSTON
United States District Judge